Statement of

Hon. William C. Canby, Jr.
Judge, United States Court of Appeals
for the Ninth Circuit

to the

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Good morning Mr. Chairman and Members of the Committee. I appear here as a former professor of Indian Law who has worked on technical assistance programs with tribal courts over the years. For the past twenty-one years I have been a judge of the United States Court of Appeals for the Ninth Circuit, and am chair of the Ninth Circuit Council Committee on Tribal Courts. I preface all of my remarks with the disclaimer that the views I express are my own; I cannot and do not speak for my court or the federal judiciary in general.

I have been asked to elaborate on recent trends in the Indian Law decisions of the Supreme Court during the past several years, particularly with reference to a divergence between the trend of those decisions and the Indian Law policies of Congress and the Executive Branch.

Others will describe for the Committee the general historical overview of

Indian Law, in terms of judicial decisions, legislation, and actions of the Executive Branch. I wish to focus on a few recurring themes in the line of Supreme Court decisions in the past thirty years, to emphasize the development of certain doctrines that have, in my view, led to decisional law that has significantly changed the legal status of Indian tribes in ways that differ from earlier decisional law and from the patterns set by Congress and the Executive Branch. The doctrines of the Supreme Court that I will discuss involve: (1) preemption analysis when state interests conflict with tribal interests; (2) the discovery of new limitations on tribal power because of the tribes' status as domestic dependent nations; and (3) the diminishing role of territoriality in the concept of tribal power. I will then discuss one example of congressional overruling of a Supreme Court decision and some of the questions that arose in its aftermath.

I

The basic judicial concepts of Indian Law were, of course, established by Chief Justice John Marshall in the Cherokee cases. He recognized tribes as self-governing bodies that he termed "domestic dependent nations" in Cherokee Nation v. Georgia, 30 U.S. 1 (1831), and then held that the Cherokee Nation governed a distinct territory "in which the laws of Georgia can have no force." Worcester v. Georgia, 31 U.S. 515 (1832). In holding that the tribes enjoyed a special

relationship with the United States, and that the states did not exercise power over the tribes or their territories, Marshall was acting entirely consistently with the series of Trade and Intercourse Acts that had been passed by Congress, beginning with the first Congress in 1790. 1 Stat. 137 (1790).

Over the ensuing years there were major movements in Indian law initiated by Congress or the Executive Branch, including the removal of tribes to the west and, in the 1880's, a policy of allotment designed to break up the tribal landholdings into small individual farms. Many years later, Congress acknowledged that the allotment policy had been a disaster and enacted the Indian Reorganization Act of 1934, which was based on the proposition that the tribes were here to stay as self-governing bodies with power over their territories. There was an interruption in this view during the 1950's, when congressional acts were passed to terminate the special relationship between specified tribes and the federal government. At the same time, Public Law 280 extended the civil and criminal jurisdiction of certain named states into Indian country, and permitted other states to elect to do the same without tribal consent. This period of "termination" came to an end with the passage of the Indian Civil Rights Act of 1968 and the President's statement on Indian affairs in 1970. Since that time, such measures as the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Tribal

Government Tax Status Act of 1982, have clearly signaled a congressional policy of encouraging tribal self-government.

Tribal self-government was also supported by the Supreme Court in the 1959 case of Williams v. Lee, 358 U.S. 217. In holding that a non-Indian was required to go to tribal court to sue an Indian over a debt incurred in a transaction on the reservation, the Supreme Court stated that its ruling was necessary to preserve "the right of reservation Indians to make their own laws and be ruled by them." Id. at 220. Notably, this right of self-government was protected by requiring a non-Indian to come to tribal court. Williams v. Lee was an important modern foundation of decisional Indian law, and under its regime all three branches of the federal government by 1970 were united in a strong view of tribal self-government over tribal territories.

The 1970's marked the beginning of a shift in the Supreme Court away from a view of the tribes as entities with full governmental power over their territories. The first doctrinal step occurred in a case generally regarded as a victory for the tribes—McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973). That case held that Arizona could not tax the income of an Indian earned on a reservation, but the analysis contained the seeds of a diminution of tribal power. McClanahan considered tribal sovereignty to be a mere "backdrop" for the determination of

whether states could exercise their power over subjects in Indian country. If federal laws and treaties, read against the backdrop of sovereignty, preempted state power, then the state was excluded. This analysis reversed a previous presumption: that states had no power in Indian country unless some positive reason (or legislation) existed to extend it there. Under the McClanahan approach, state power extended into Indian country unless a positive federal law or policy excluded it. Thus preemption doctrine, as it has been formulated since McClanahan favors the extension of state power into Indian country. An example is Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), which permitted a state to impose a severance tax on non-Indian oil and gas lessees on a reservation, even though the tribe also imposed a tax.

II

A far greater doctrinal limitation on Indian tribal power was employed in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which held that tribes had no criminal jurisdiction over non-Indians who committed crimes on their reservations. The Court held that exercise of criminal jurisdiction over non-Indians would be inconsistent with the status of the tribes as domestic dependent nations. Chief Justice Marshall, who had characterized tribes as domestic dependent nations in Cherokee Nation v. Georgia, delineated only two limitations on full sovereignty

that attended the tribes' status as domestic dependent nations: (1) they could not alienate their land other than to, or with the consent of, the federal government, and (2) they could not enter treaties or other agreements with foreign nations. For 150 years these limitations were generally assumed to be the only two that flowed from the tribes' status. Oliphant came up with a new limitation, and since that time, other Supreme Court decisions have proliferated the limitations that are deemed to arise from the tribes' domestic dependent status. Thus, in Montana v. United States, 450 U.S. 544 (1981), a tribe's regulation of non-Indian hunting on non-Indian land within the reservation was held to be inconsistent with the tribe's domestic dependent status. One case went so far as to state that a tribe's domestic dependent status prevented it from adopting preemptive regulation of liquor sales on its reservation. Rice v. Rehner, 463 U.S. 713, 726 (1983). Tribes were held to lack criminal jurisdiction over non-member Indians because of their domestic dependent status. Duro v. Reina, 495 U.S. 676 (1990). And, under the refinement introduced by Montana v. United States, which I will discuss in a moment, tribes have been held to lack inherent authority to adjudicate civil disputes between nonmembers arising out of activities on a highway right-of-way within the reservation. Strate v. A-1 Contractors, 520 U.S. 438 (1997). Most recently, tribes have been held to be precluded by their domestic dependent status from collecting

a hotel room rental tax from a non-Indian hotel on non-Indian fee land within a reservation, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), and from regulating the activities of state law enforcement officers executing a search warrant of an Indian dwelling on Indian land within the reservation, when the investigation concerns a crime allegedly committed off-reservation. Hicks v. Nevada, 121 S.Ct. 2304 (2001).

These recently-announced additional limitations on the powers of tribes because of the tribes' domestic dependent status create numbers of questions for lower courts. It is easy for historical reasons to understand why tribes could not alienate their land except to, or with the consent of the federal government, and it is easy for reasons of international law to understand why tribes are not allowed to enter treaties with foreign nations. Both of these limitations are explainable as inherent in the status of the tribes as internal nations owed a duty of protection by the federal government. But the new limitations on tribal sovereignty do not seem to have such compelling necessity behind them. Tribes could exercise criminal and civil jurisdiction over persons within their territory without torturing their status as domestic dependent nations. So it is difficult to predict when a challenged exercise of tribal power is to be upheld on the ground that the power is inconsistent with the tribe's domestic dependent status. One way of drawing a bright line, and that

indeed seems the direction in which things are going, is to say that a tribe has no power over nonmembers at all. Such a rule provides certainty, but leaves the tribe with almost no governmental power at all, greatly reducing tribal authority below the level it enjoyed under Williams v. Lee and below the level that is contemplated by existing legislation Congress and policies of the Executive Branch. Short of that drastic formulation, it is difficult under the current trend of Supreme Court decisions to draw a predictable line defining what tribes may do or not do as domestic dependent nations.

Perhaps the watershed case of recent times, although it did not appear to foreshadow such immense changes when it was announced, is Montana v. United States, 450 U.S. 544 (1981). That decision held that a tribe, as a domestic dependent nation, had no power to regulate hunting and fishing by non-Indians on non-Indian fee land within a reservation. At the time, this ruling did not appear to be a large exception to the general proposition that tribes could regulate non-Indian activity within their reservation; Montana freely acknowledged that tribes could regulate or prohibit hunting or fishing on Indian lands within the reservation. Moreover, there were two acknowledged exceptions that permitted tribes to regulate non-Indian activity even on non-Indian fee land: (1) the tribe could regulate activities of nonmembers who entered consensual relationships with the tribe or its

members, such as leases or licenses; and (2) the tribe could regulate activities of nonmembers on fee land that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. This latter exception, with its language reflecting the traditional view of a state's police power, suggested that a tribe could regulate non-Indians whenever its reasonable interests supported such regulation.

Montana contained some expansive language, however, describing tribal sovereignty in terms of power over members, implying the absence of power over others. In later years, the Supreme Court has emphasized this aspect of the Montana opinion. The fact that Montana was an exception to the general rule that tribes could regulate nonmember activity within their borders seems to have disappeared from sight. In later cases, the Montana exception has become the Montana "rule" that tribes have no power over nonmembers. In Strate v. A-1 Contractors, 520 U.S. 438 (1997), for example, the Supreme Court held that a tribe had no regulatory authority over nonmember activities on a state highway right-of-way through the reservation; even though the highway was on tribal land, not fee land, the tribe had given up the right to exclude and therefore the Court treated it as if it were fee land. The Court also concluded that a tribe's adjudicatory jurisdiction (by civil suit in tribal court) could not exceed its regulatory jurisdiction. It is

difficult to see where this limitation came from. Most courts, of course, are not so restricted; an Arizona court can entertain a case arising from an automobile accident in New York even though Arizona would have no authority to regulate the conduct of the parties in New York.

Most egregiously, Strate held that a highway accident within the reservation did not affect the welfare of the tribe, so as to fall within the second exception prescribed by Montana. Strate stated:

> Undoubtedly, those who drive carelessly on a public highway running through the reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.

520 U.S. at 457-58. But this formulation ignores the fact that the Montana rule was itself an exception. If, as a general proposition, it is improper to permit exceptions to swallow rules, then Montana itself should be narrowly construed, so that it does not erode the general rule that tribes have regulatory jurisdiction over activities on their reservations. Accordingly, Montana's exceptions, being exceptions to an exception, must be construed broadly.

The Montana rule continued to be broadened, and its exceptions narrowed, to the detriment of tribal power in two decisions of last term, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), and Nevada v. Hicks, 121 S.Ct. 2304 (2001).

Atkinson held that the Navajo Nation could not tax room rentals in a trading post hotel on fee land within the reservation, even though the trading post benefited from various tribal services. The Supreme Court applied Montana and, again, read the exceptions narrowly. License as a trading post was not closely enough related to operation of a hotel to fall within the "consensual" exception, and the second exception to Montana did not apply because "[w]hatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity." 532 U.S. at 659. Perhaps most interesting of all, Justice Souter (joined by Justices Kennedy and Thomas) entered a concurring opinion stating that "[i]f we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be Montana v. United States." And, he continued, Montana's principle that tribal authority does not extend to nonmembers should apply "whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe." Id. at 659-60. Under this apparently developing view, tribes lose the power to regulate nonmembers on trust land, a power that was accepted as a given in Montana.

Hicks took the last step, in holding that tribes had no power to regulate the activities of state law enforcement officers executing a search warrant against an

Indian on tribal land within a reservation. The Supreme Court's opinion states that the Montana "rule" that tribes have no inherent power to regulate nonmember activity applies on tribal as well as fee lands! Once that proposition is established, then under Strate a tribal court could not entertain a civil suit against the officers for exceeding the scope of the warrant because a tribe's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction.

The expansive rationale of Hicks represents an astonishing diminution in the control that tribes may exercise over their own reservations. Montana assumed that tribes could control non-Indians, but carved out an exception for non-Indian hunting and fishing on Indian land if it was not consensual with the tribe and did not affect the welfare of the tribe. In Hicks, Montana is invoked as support for the proposition that the tribe cannot regulate nonmembers even on tribal land, unless the activity falls within two exceptions that are being ever-more-narrowly construed. It is clear that, between the dates of Montana and Hicks, a major shift has occurred in the Supreme Court's view of tribal authority.

III

One characteristic of the considerable shift in the Supreme Court's recent Indian Law cases is the movement away from a territorial view of tribal power. To John Marshall in the Cherokee Cases, tribal power was clearly territorial; the tribes

exercised power over their reservations and the laws of Georgia could not intrude. Later in the nineteenth century, state law was permitted to govern the activities of non-Indians on reservations, so long as the activity did not involve Indians or have an effect on Indians. There was no reason to doubt, however, that enough of John Marshall's original concept remained so that tribes could govern their territories largely in the way that any other sovereign did. If the tribes' power over non-Indians was rarely exercised, it had not been negated. And as tribal governments were buttressed by the Indian Reorganization Act of 1934, it was natural to assume and expect an increasing exercise of tribal powers over the reservation.

The Oliphant decision put a stop to this trend by holding that tribes had no criminal jurisdiction over non-Indians. At about the same time, the Supreme Court decided United States v. Wheeler, 435 U.S. 313 (1978), which for the first time made the jurisdictional distinction not between Indians and non-Indians, but between tribal members and nonmembers. Thus began a shift in emphasis from tribal power as governmental power over a territory to tribal power as a function of membership. Without a territorial concept, any analysis of challenged governmental power is likely to be very restrictive. It is very difficult to conceive of a government that wields power other than over a territory; we do not regard governments-in-exile, for example, as real governments—they are potential

governments that presume to become governments over a territory. When tribal power is viewed only through a membership lens, then tribal power is automatically restricted to power over members, leaving tribes with no more governmental power than a club or a union or a church may exercise over its members.

Until recently, the courts in deciding jurisdictional questions in Indian law looked to Congress's definition of Indian country for criminal-law purposes, which included all land within the exterior boundaries of a reservation whether owned in fee by non-Indians or not. See 18 U.S.C. § 1151. Montana, however, introduced a new distinction between tribally owned land and fee land within a reservation. Later another wholly new, but less frequently used, distinction was introduced between "open" and "closed" portions of a reservation for purposes of tribal zoning. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). The tribe was permitted to exercise zoning authority over all lands in the closed portion.

Almost every move away from a purely geographical delineation of tribal power has resulted in a diminution of that power. In 1982, when a more expansive view of tribal power still obtained in some fields, the Supreme Court upheld a tribal tax on non-Indian mineral lessees of tribal property, and in doing so the Court was careful to assert that the power to tax did not depend only on the tribe's power to

exclude persons from its reservation: "it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). By the time of Atkinson last year, however, Montana controlled and a tribe could not tax non-Indian activity on fee land (with three justices asserting that it made no difference whether fee land or tribal land was involved).

Another facet of a non-geographical approach to tribal power is illustrated by Strate v. A-1 Contractors, which held that tribes could not regulate non-Indian activity on a highway located on Indian land within a reservation because the right-of-way deprived the tribe of the power to exclude. Under Merrion's more expansive view of tribal power, jurisdiction to regulate would not have depended on a right to exclude.

The trend, therefore, away from a territorial-geographical view of tribal governmental power is one more facet of the general shift in Supreme Court jurisprudence toward a highly restrictive view of tribal authority.

IV

All of these doctrinal trends of the Supreme Court cases, which have led to a far more restrictive view of tribal power than existed in the 1960's, were judicial constructs. The Supreme Court did not take its lead in these matters from

congressional or executive policies. Indeed, as I observed earlier, Congress in 1934, and again consistently since 1968, has placed its emphasis on the strengthening of tribal self-government. The Executive Branch has done the same since 1970. It is hard to see where the new direction in restricting power comes from, other than from the Supreme Court.

In fairness, the Supreme Court has acknowledged that its actions dealing with tribal authority were taken in the absence of controlling statutes, and have recognized the appropriateness of Congress delineating the extent of tribal authority. See, e.g., Oliphant, 435 U.S. at 212. It is also possible that at least some of the Justices have not understood what an enormous change their recent jurisprudence represents in Indian country. In Hicks, for example, the state judge had done what virtually any state judge in the West would have done in the last 50 years; he told the state officers that his writ was of no effect against an Indian on the reservation and that any search warrant he issued would have to be approved by the tribal court before it could be executed on the reservation. Under the rationale of the Supreme Court in Hicks, however, the state judge was just engaging in an unnecessary nicety; the tribe had no authority at all over the state officers on the reservation. Similarly, the extradition arrangements that many tribes have worked out with the states over the past decades are just so much waste paper; no

extradition is necessary under the rationale of Hicks. Hicks thus upsets settled expectations in Indian country to a degree that may not have been apparent to all of the Justices (or many others). Just how disruptive Hicks will be may depend on the local relationship between particular tribes and the state and local governments; some may continue to function cooperatively as before. As a matter of doctrine, however, Hicks does not encourage such cooperation, and removes its necessity.

V

There was an instance about a decade ago when Congress promptly overruled a decision of the Supreme Court dealing with tribal power. In Duro v. Reina, 495 U.S. 676 (1990), the Supreme Court ruled that it was inconsistent with the domestic dependent status of tribes to exercise criminal jurisdiction over nonmember Indians who commit crimes in Indian country. Congress, first temporarily and then permanently, overruled this decision by enacting the following provision

> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2)"powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, . . ; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

* * * *

25 U.S.C. § 1301(2) (emphasis added to new language).

The effect of this provision was recently the subject of an en banc decision of my court (I was not a member of the en banc panel) in United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 122 S.Ct. 925 (2002). The question was whether, after the above amendment was enacted, a nonmember Indian could be tried both by a tribal court and a federal court for the same offense without violating the double jeopardy clause of the Constitution. In the ordinary case, there is no problem with such double prosecutions because each sovereign, the tribe and the federal government, acts on its own authority. United States v. Wheeler, 435 U.S. 313 (1978). The question posed by Enas was whether the tribal authority recognized by the statutory amendment of 25 U.S.C. § 1301(2) was a form of inherent tribal authority or was a grant of delegated federal authority. If it was delegated, then the tribe in prosecuting was exercising a form of federal authority and the federal government could not then conduct a second prosecution. The en banc court in Enas unanimously held that the tribe was exercising its own sovereign authority in prosecution Enas, so the double jeopardy clause was not violated by a later federal prosecution. Six judges ruled that Congress was correcting the history discussed by the Supreme Court when it decided Duro.

Because this history was a matter of federal common law, not constitutional law, Congress had the power to revise it. With the history corrected, it was clear to the six-judge majority that the tribal power was historical and inherent.

A five-judge concurring opinion took a more direct view, stating that when Congress authorized a tribe to prosecute, it was simply enabling the tribe to exercise an independent sovereign power which did not necessarily depend on history.

Under both views expressed in Enas, there is no question of Congress's power to modify the boundaries of tribal power as delineated by the Supreme Court. Under the six-judge majority view, the recognition by Congress of a new, non-historical tribal power would be a federal delegation of power, the exercise of which by the tribe would be subject to the double jeopardy clause and many additional constitutional restraints. By the five-judge concurring view, any congressional recognition of governmental power by tribes would result in the tribes' exercising their own sovereign power, subject of course to the restraints of the Indian Civil Rights Act but not the federal Constitution. I must say that I am a partisan of the five-judge concurring view. The most important point, however, is that the entire en banc panel saw no difficulty in recognizing the effectiveness of the congressional overruling of Duro; the only discussion was over the collateral

effects of such overruling.

VI

In summary, the recent decades have seen a significant change in the Supreme Court's view of the inherent power of Indian tribes. Many decisions, culminating in last term's Atkinson and Hicks, have substantially changed what has long been assumed to be the boundaries of tribal and state power in Indian country. The new restrictions on tribal power represent a judicial trend only; they have not been paralleled by any changes in congressional or executive policies concerning Indian affairs. None of the changes in the boundaries of tribal and state power effected by Supreme Court decisions are based on the Constitution; they accordingly are subject to modification at the will of Congress in the exercise of its power over Indian affairs.

That concludes my testimony. Mr. Chairman and Members of the Committee, I thank you for giving me this opportunity to express my views to you.